Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

JOE C. ROWE and wife, SHARON B. ROWE, and
HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce the award by the value of the *general* benefits said to accrue to the remainder of the tract as a result of the taking.

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PETITION FOR WRIT OF CERTIORARI

Joe C. Rowe, Sharon B. Rowe, Howard L. Pruitt, Jr., and Georgia Pruitt respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 549 S.E.2d 203 (N.C. 2001); it appears at Appendix A to the petition. The opinion of the North Carolina Court of Appeals is reported at 531 S.E.2d 836 (N.C. Ct. App. 2000); it appears at Appendix B to the petition.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on July 20, 2001. Petition Appendix (Pet. App.) at A-1. On October 1, 2001, the Chief Justice granted petitioners' application to extend the time in which to file the petition to and including November 16, 2001. *See* No. 01A288. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

North Carolina General Statutes § 136-112 provides in pertinent part:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

STATEMENT OF THE CASE

The facts of this case are extremely simple. To construct a road that would connect two highways in Catawba County, North Carolina, respondent brought this condemnation action in state court in 1995, seeking to condemn 11.411 acres of an 18.123-acre tract owned by petitioners. Among other things, respondent's complaint prayed that "just compensation for the [taking] herein set forth be determined according to the provisions and procedures contained in Article 9 of Chapter 136 of the General Statutes." Complaint (filed June 26, 1995). Those provisions include Section 136-112(1) (quoted above), which provides that where (as here) only a part of a tract is taken, the measure of just compensation is the difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking—"with consideration being given to any special or *general benefits* resulting from the utilization of the part taken for highway purposes" (emphasis added).

Petitioners' answer challenged Section 136-112(1) as unconstitutional: among other things, the statute "denies [them] just compensation for the taking of their property and therefore is . . . in violation of Amendment V . . . and Amendment XIV . . . of the Constitution of the United States." Answer, Motions and Counterclaim at 1 (filed May 17, 1996). The trial court rejected this federal constitutional challenge and instructed the jury in accordance with the statute. The jury rendered a verdict that petitioners were not entitled to *any* financial compensation whatsoever for the taking of their 11.411 acres. As the North Carolina Supreme Court observed: "The verdict reflected that the jury agreed with [respondent's] argument that the 'general benefits' to [petitioners'] remaining property from the project exceeded the cost of the loss of acreage." Pet. App. at A–2.

Petitioners renewed their constitutional challenge in the North Carolina Court of Appeals. After the case went up and down on procedural issues, *see* 505 S.E.2d 911 (N.C. Ct. App. 1998), *rev'd*, 521 S.E.2d 707 (N.C. 1999), the appellate court ruled in petitioners' favor. The court held that "a statute, such as [Section] 136-112(1), allowing *general* benefits to be used as a setoff is unconstitutional," as it violates "the constitutional requirement of providing just compensation in condemnation proceedings." Pet. App. at B–18. The North Carolina Supreme Court reversed in turn:

> Because [Section 136-112(1)] allows a jury to consider "general benefits," the Court of Appeals held that it "allows a compensation which is unjust to the condemnee." [Pet. App. at B–18.]
>
> We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider "general benefits." *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366 . . . (1918).

Pet. App. at A–8.

From this ruling interpreting the Fifth Amendment's Just Compensation Clause, petitioners timely file their petition for certiorari.

REASONS FOR GRANTING THE WRIT

As set forth below, the decision of the Supreme Court of North Carolina conflicts with numerous decisions of state and federal appellate courts. Moreover, the lower court's error in applying federal just compensation law is sufficiently demonstrable as to make it a serious candidate for summary reversal.

I

WHETHER JUST COMPENSATION FOR PROPERTY ACTUALLY TAKEN FOR PUBLIC USE MAY BE REDUCED BY THE VALUE OF "*GENERAL* BENEFITS" IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN SHARP CONFLICT WITH EACH OTHER

When government takes private property for public use, the Fifth Amendment (made applicable to state agencies like respondent through the Fourteenth Amendment) mandates that the expropriated owners receive "just compensation." As this Court has stated, "[s]uch compensation means the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). That is, "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *Id.* Thus, where an entire tract is taken, just compensation is "normally measured by [the tract's] fair market value." *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984) (citing *Miller*).

Sometimes matters are more complicated. Where, as in the present case, "only a portion of a single tract is taken, the owner's compensation for that taking includes any element of

value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage." *Miller*, 317 U.S. at 376 (footnote omitted). Moreover—and more germane to the present case—"if the [partial] taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken." *Id.*

In applying this "setoff" rule identified in *Miller*, courts consistently distinguish between two types of benefits that may accrue to the property owner's remaining land: "general" and "special." As the court below explained, *general benefits* are defined as increases in the value of property that "result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment." Pet. App. at A–7. Examples of general benefits include "the rise in property value due to increased traffic flow, an aesthetic upgrading of a neighborhood, or more convenient parking." *Id.* By contrast, *special benefits* are increases in the value of land that "arise from the peculiar relation of the land in question to the public improvement"—for example, "the rise in property value due to newly acquired frontage on a public street." *Id.*[1]

It is universally agreed that the Fifth Amendment permits (though it does not require) the government to set off *special* benefits in awarding compensation for partial physical takings. The question presented by this case is whether that setoff may constitutionally also include *general* benefits—those that inure

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[1] These formulations are consistent with those of other courts and commentators. *See, e.g., Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999) ("[A]s a general matter, special benefits are those which inure specifically to the landowner who suffered the partial taking and are associated with the ownership of the remaining land. In contrast, benefits that inure to the community at large are considered general." (citation omitted)); 3 Julius L. Sackman et al., *Nichols on Eminent Domain* § 8A.02[4] (rev. 3d ed. 2001) (hereinafter *Nichols*).

to the community at large. Consistent with Section 136-112(1) of the General Statutes of North Carolina, the Supreme Court of North Carolina answered that question in the affirmative: under the statute upheld by the court below, it is perfectly plain that compensation for partial takings of private property must be reduced by the value of general as well as special benefits resulting from such takings.

The law is the same in at least two other states. Like its sister state, South Carolina recognizes no distinction between kinds of benefits in reducing compensation for partial takings. *See, e.g., Bramlett v. City Council of Greenville*, 70 S.E. 450, 452 (S.C. 1911) (approvingly citing antebellum decision holding that "when the benefits accruing to the landowner were to be taken into account in awarding damages to an owner for the taking of his land, all benefits, *general as well as special*, were to be estimated" (emphasis added)); *Smith v. City of Greenville*, 92 S.E.2d 639, 644-46 (S.C. 1956) (adhering to *Bramlett*). In addition, New Mexico law has long prescribed that where part of a tract is taken, "benefits, both general and special, should be set off against damages to the remainder and against the part taken." *Board of Commissioners v. Gardner*, 260 P.2d 682, 684 (N.M. 1953).

Arrayed against these three jurisdictions, however, is the overwhelming weight of authority, both federal and state. *See* 3 *Nichols*, *supra* note 1, § 8A.02[6] ("[T]he Supreme Court of the United States and a majority of other jurisdictions have held that only special benefits may be constitutionally setoff." (footnote omitted)). In the federal courts of appeals, "it is . . . the law that only 'special' benefits can be deducted from any compensation due; 'general' benefits cannot be deducted." *Hendler v. United States*, 175 F.3d 1374, 1380 (Fed. Cir. 1999); *accord, e.g., 6816.5 Acres of Land v. United States*, 411 F.2d 834, 837 (10th Cir. 1969) ("The benefits [to the remainder] that arise in these situations have been characterized by the courts as 'direct,' 'indirect,' 'general,' and 'special,' with only 'direct' and

'special' being allowed as a set off."); *United States v. Trout*, 386 F.2d 216, 221 (5th Cir. 1967) ("Special benefits [are to be] distinguished from general benefits which do not offset recovery . . . .").

In addition to the federal appellate courts, numerous state courts of last resort have issued decisions in conflict with the decision below. For example:

> In Delaware, both the value of the taken property and any damages to the remaining land may be reduced by the benefits to the landowner. This set off rule is inherent in the constitutional requirement of just compensation. However, such a reduction is permissible only with respect to special benefits accruing to the remaining land. *General benefits, i.e., benefits accruing to the entire community by reason of the improprieties* [sic] *contemplated by the taking, may not be set off.*

Acierno v. State, 643 A.2d 1328, 1332 (Del. 1994) (citations omitted and emphasis added). Likewise in Minnesota:

> [W]hen part of a tract is taken the owner is entitled to the difference between the market value of the tract immediately before the taking and the market value of what is left after the taking, *excluding from consideration general benefits* and deducting from the difference special benefits.

State ex rel. Lord v. Hayden Miller Co., 116 N.W.2d 535, 537 (Minn. 1962) (emphasis added); *see also Caponi v. Carlson*, 392 N.W.2d 591, 596 (Minn. Ct. App. 1986) (holding that "the city took Caponi's property without compensation in violation of U.S. Const. amend. V" and affirming that in such cases, "the owner is entitled to the difference in market value immediately before the taking and the market value of the remaining tract after the taking, excluding from consideration general benefits

and deducting special benefits"). Many other state courts are in accord.[2] Moreover, to the extent that state courts have not taken a position on the matter, it is because they employ a rule that is *more generous* to expropriated property owners: they

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[2] *See, e.g., Lazenby v. Arkansas State Highway Commission*, 331 S.W.2d 705, 708 (Ark. 1960) ("[T]he benefits which are deductible [against just compensation] are the benefits which are peculiar and special to the land involved."); *E-470 Public Highway Authority v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000) ("When a portion of a tract or parcel of land is taken for highway acquisition, the compensation for the property taken and damages to the residue shall be reduced by the amount of any special benefits which result from the improvement or project . . . ."); *State ex rel. Attorney General v. Midkiff*, 516 P.2d 1250, 1254-55 (Haw. 1973) ("Clearly, a method of valuation that does not distinguish between special and general benefits does not meet the test of fairness that is fundamental to a determination of just compensation," as only the former may "be used as an offset to the value of the property taken."); *City of Wichita v. May's Co.*, 510 P.2d 184, 188 (Kan. 1973) ("[S]pecial benefits to the remaining land may be deducted from an award of compensation, but general benefits may not."); *State ex rel. State Highway Commission v. Tate*, 592 S.W.2d 777, 778 (Mo. 1980) ("It is well-settled in Missouri that special benefits to the residue of a landowner's property may be set off against the award of compensation for a taking in a condemnation suit, but general benefits may not be set off."); *State v. Templeman*, 693 P.2d 125, 127 (Wash. Ct. App. 1984) ("just compensation in an eminent domain action [is] compensation for the land taken plus any injury to the remaining land, after offsetting against such award any special benefits accruing to the remainder by reason of the State's use of the land taken"); *Red Top Farms v. State Department of Transportation*, 503 N.W.2d 354, 356 (Wis. Ct. App. 1993) (observing that Wisconsin law "permits setoffs only for 'special' benefits, not for all benefits resulting in appreciation in the land remaining following eminent domain proceedings"); *State Highway Commission v. Rollins*, 471 P.2d 324, 329 (Wyo. 1970) ("The prevailing rule today, . . . whether by statute or otherwise, is to limit the setoff to special benefits.").

allow *no* deduction of benefits (general or special) for property that is actually taken.[3]

The importance of this issue cannot be gainsaid. Though questions of "takings" garner the most attention in the interpretation of the Just Compensation Clause, in "the overwhelming majority of real-world applications of the Clause, these weighty questions of law simply do not arise." Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 147 (1996). That is because a very high percentage of the cases that implicate the Clause are

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[3] *See, e.g., State v. Lewis*, 785 P.2d 24, 27 n.3 (Alaska 1990) ("A special benefit will not reduce the amount the owner is entitled to recover for the property actually taken."); *State ex rel. Miller v. Filler*, 812 P.2d 620, 622-23 (Ariz. 1991) (holding that severance damages, but not compensation for property actually taken, "are offset by any special benefits the remaining property receives because of the proposed improvement"); *Louisiana Power & Light Co. v. Lasseigne*, 240 So. 2d 707, 710 (La. 1970) (reiterating the rule that "benefits . . . may be set off from the damages to the remaining land, but not from the value of land taken"); *Frank v. State Department of Roads*, 127 N.W.2d 300, 303 (Neb.), *reh'g denied*, 129 N.W.2d 522 (Neb. 1964) ("The measure of damages for property taken for public use is the fair and reasonable value of the property actually appropriated and the difference in the fair and reasonable market value of the remainder of the property before and after the taking."); *State Highway Commission v. Bailey*, 319 P.2d 906, 914 (Or. 1957) ("It is now firmly established by our decisions that [special] benefits may be set off or employed to reduce the damages to the remainder of the tract not taken, but cannot be used to adversely affect the right of the owner to receive the fair cash market value of the land actually taken."); *Capital Properties v. State*, 636 A.2d 319, 323 (R.I. 1994) (holding that special benefits may offset severance damages but "the state may not offset any excess special benefits to the remainder against the value of the part taken"); *State v. Schmidt*, 867 S.W.2d 769, 779-80 (Tex. 1993) (construing condemnation statute allowing "peculiar" benefits to be set off against severance damages but not against the value of property taken), *cert. denied*, 512 U.S. 1236 (1994).

condemnation cases, and the "only issue at trial in most [such] proceedings is the amount of compensation due the property owner." *Id.* It is reasonable to conclude that the determination of such amount will entail a setoff of benefits in a significant percentage of cases.[4] Moreover, though the rules about which benefits may be set off against the value of the land taken are usually of ancient vintage, they are applied frequently to this day. *See, e.g., Frontage Development Corp. v. City of Boston*, No. 98-0629-C, 2001 Mass. Super. LEXIS 149, at *9 (May 4, 2001); *County of Hennepin v. Lurton*, No. C8-00-1157, 2001 Minn. App. LEXIS 359, at *2 (Apr. 10, 2001); *City of Branson v. Estate of Lafavre*, 9 S.W.3d 755, 758 (Mo. Ct. App. 2000).

Not only does the issue arise with continuing regularity, the choice of rules can have dramatic effects on the outcomes of cases. Indeed, where courts set off general as well as special benefits against awards for property actually taken, the Fifth Amendment guarantee of "just" compensation is often transformed into a rule of *no* compensation. In the present case, for instance, respondent was permitted to take 11.4 acres of petitioners' land for no compensation at all. Essentially the same result obtained in two cases showing that South Carolina and New Mexico have the same rule as North Carolina. *See Smith*, 92 S.E.2d at 641, 646 (city was allowed to take a half-acre of

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[4] One can infer this conclusion from the fact (a) that "[t]he primary object for the exercise of eminent domain in any community is the establishment of roads," 1 *Nichols*, *supra* note 1, § 1.22[1]; (b) that condemnation of property for roads and highways by nature generates partial takings in many if not most circumstances (typically for frontage), *see supra* notes 2-3 (listing numerous partial takings cases initiated by highway departments); and (c) that the building or widening of roads is one of the quintessential activities that generate the benefits, both special and general, that can conceivably be set off against the actual value of the land taken, *see, e.g.*, Pet. App. at A–7 (identifying "increased traffic flow" and "newly acquired frontage" as examples of general and special benefits, respectively).

improved land for no compensation at all); *Gardner*, 260 P.2d at 686 (county could have taken 88.8 acres for no compensation at all, had it preserved the point for appeal).

For all these reasons, it is manifest that the North Carolina Supreme Court has decided an important question of constitutional law in a manner that conflicts with the decisions of other state courts of last resorts and of the federal courts of appeals. A grant of certiorari is warranted under Rule 10(b).

II

THE LOWER COURT'S DEMONSTRABLY ERRONEOUS APPLICATION OF FEDERAL LAW WARRANTS SUMMARY REVERSAL

Although a tool that is employed infrequently, summary reversal is available to "correct[] a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999). Petitioners respectfully submit that the decision below qualifies for such treatment.

First, the decision is manifestly contrary to the uniform rule in the federal courts, a rule that derives directly from this Court's decision in *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See, e.g., Hendler*, 175 F.3d at 1379 (citing *Bauman*); *6816.5 Acres of Land*, 411 F.2d at 837 n.1 (same); *Trout*, 386 F.2d at 221 (same). *Bauman* itself held that "when part only of a parcel of land is taken for a highway," and when "the part which [the owner] retains is *specially and directly* increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened" thereby. 167 U.S. at 574 (emphasis added).[5] This Court has never deviated from

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[5] In the course of justifying this rule as the correct measurement of the "just compensation required by the Constitution," *id.*, the Court observed that "[i]n New York, the courts have gone *beyond this* in allowing benefits to be taken into consideration." *Id.* at 577 (emphasis added). (continued...)

Bauman's holding that only "special[] and direct[]" benefits may be set off.

Second, the Supreme Court of North Carolina stumbled badly in claiming to the contrary. Asserting that "[i]t is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider 'general benefits' when calculating just compensation," the court below quoted from this Court's decision in *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354, 366 (1918):

> [W]e are unable to say that [a landowner] suffers deprivation of any fundamental right when a state . . . permits consideration of the actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages [i.e., the benefits are general].

Pet. App. at A–8.

This quotation, while superficially supportive of the rule followed by the court below, is extremely misleading. *McCoy* was a common-law action brought in the courts of Illinois "for an alleged damage to the property of plaintiff arising from the construction [maintenance and operation] of the structure in the abutting street for elevated railroad purposes." 247 U.S. at 358. Although the plaintiff invoked that state's analogue to the Just Compensation Clause, there was a crucial difference between the Fifth Amendment and the Illinois constitution at the time. The latter provided that "private property shall not be taken *or damaged* for public use without just compensation." 247 U.S. at 363 (emphasis added). Because the elevated railroad (Chicago's famous Loop "L") was constructed entirely on

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[5] (...continued)
sis added). How so? Under that state's constitution, "*both special and general benefits* from the laying out of a street may be set off against the value of the part taken." *Id.* at 578 (emphasis added).

public property, the plaintiff's claim was not for a taking but for a "damaging": "And here it must be noted that the claim is for damages to property *not actually taken* from the owner's dominion." *Id.* (emphasis added); *accord id.* at 364 (quoting the state supreme court as referring "land not taken," to "lands not taken," and twice to "property not taken"). In other words, *McCoy* was not even a takings case!

Moreover, in explaining why it was sustaining the Illinois rule that permitted general benefits to be offset in determining whether property was "damaged" in a constitutional sense, the Court reiterated that such rule governed what allowance should be made for benefits "in arriving at the amount of damage to *property not taken*." *Id.* at 366 (emphasis added). Here, then, is the larger passage from which the Supreme Court of North Carolina quoted only the middle sentence:

> It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it—compensation to the owner in that form is permissible. And we are unable to say that he suffers deprivation of any fundamental right when a State goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

Id. Consequently, where (as here) property *is* actually taken, *McCoy* provides no basis whatsoever for abandoning—or even questioning—the prevailing federal rule that "only 'special' benefits can be deducted from any compensation due; 'general' benefits cannot be deducted." *Hendler*, 175 F.3d at 1380.

Third, the prevailing federal rule—the rule rejected by the Supreme Court of North Carolina in this case—closely comports with the purpose of the Fifth Amendment's guarantee of "just compensation." In giving content to this guarantee, "this Court has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken.'" *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see also, e.g., 50 Acres of Land*, 469 U.S. at 30 (referring to "the basic principles of indemnity embodied in the Just Compensation Clause"). A rule that allows the setoff of special benefits does just this; a rule that also allows the setoff of general benefits does not. The argument is very simple:

> General benefits may not be used to offset damages because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of the improvement and who shares in the increased value without any pecuniary loss. Arguably, the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since he is singled out and deprived of a share in the increased prosperity of his fellow citizens merely because the public happens to want a portion of his land. The condemnee pays in taxation for his share of general benefits, just as other members of the public, and therefore, is entitled to receive his fair portion of the general advantages brought about by a public improvement.

3 *Nichols*, *supra* note 1, § 8A.02[6]. As the Supreme Court of Hawaii put the point, "it is unfair for a land owner to be taxed specially through the reduction or refusal of compensation by offsetting benefits which his neighbors, whose lands are not taken, nonetheless receive free of charge." *Midkiff*, 516 P.2d at 1255 (quoting *Territory ex rel. Sylva v. Mendonca*, 375 P.2d 6, 13 (Haw. 1962)).

In addition, the prevailing rule is supported by the consideration that "the landowner whose property is taken should not be forced to shoulder a *disproportionate burden* for the public project as compared to other neighboring landowners whose property was not taken but who share in the general benefits conferred by the project." 3 *Nichols*, *supra* note 1, § 8.02[1] (emphasis added). This consideration accords with the Court's oft-repeated pronouncement that the Just Compensation Clause embodies not only indemnity but also proportionality: the Fifth Amendment's guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2466 (2001) (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

Fourth, the arguments adduced against the prevailing rule are, to put it charitably, weak. The court below asserted that acceptance of the rule "would result in [petitioners] being fully compensated for the land lost *and* being additionally compensated for 'general benefits' accruing to their remainder and to the surrounding property owners." Pet. App. at A–11. This is just plain wrong. Consistent with this Court's decisions, petitioners ask to be "fully compensated" for the 11.4 acres taken, which necessarily includes "any element of value arising out of the relation of the part taken to the entire tract," or "severance damage." *Miller*, 317 U.S. at 376. Petitioners ask for *nothing more*; indeed, they concede they may even receive *less*, to the extent respondent can prove that their remaining land received *special* benefits. How this translates into what the court below labelled "additional[] compensation" is a mystery—unless the court thought it is "compensation" for landowners to receive, in equal share with their fellow citizens, the diffuse, indirect, and in-kind benefits of public programs for which they have paid or will pay in taxes or fees. But this has never been the law.

The arguments put forth by other courts are similarly bad. The Supreme Court of New Mexico gave two justifications for departing from the prevailing rule: "the policy of the state in trying to bring down excessive costs of rights-of-way so as to make the money appropriated and available for roads and other public improvements go as far as possible"; and the "gradually changing concept of the sacred character of real property ownership which thus gradually is altering the basic theory of 'just compensation' in condemnation cases." *Gardner*, 260 P.2d at 685. A policy to minimize the fiscal burden of public projects is all well and good, but when that policy "comes into conflict with the superior authority of [the] Constitution," it necessarily must yield. *Ex parte Young*, 209 U.S. 123, 160 (1908). As the Court has made quite clear, considerations like "the inhibiting financial force which inheres in the" payment of just compensation must bow to the canon that once there has been a taking of private property, such payment is a "constitutional obligation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315, 317 (1987).

As for the so-called "gradually changing concept" of real property that was said by the New Mexico court to be "altering the basic theory of 'just compensation,'" this Court apparently did not get the message. The "basic theory" of just compensation has not changed for at least a century. *Compare 50 Acres of Land*, 469 U.S. at 29 (1984) ("[J]ust compensation normally is to be measured by the market value of the property at the time of the taking contemporaneously paid in money."), *with Monongahela Navigation Co. v. United States*, 148 U.S. 312, 341 (1893) ("Such an appropriation cannot be had without just compensation; and that . . . demands payment of the value of the property as it stands at the time of taking."). If anything, this Court's recent jurisprudence has been *more* respectful of the guarantee of just compensation. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the

Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .").

Finally, there are arguments like those advanced by the South Carolina Supreme Court in *Wilson v. Greenville County*, 96 S.E. 301 (S.C. 1918). That decision found "significant" the "marked difference" between two provisions of the state constitution, one of which mandated "just compensation" with no elaboration, while the other mandated "full compensation . . . irrespective of any benefit from any improvement proposed by [the condemnor]." *Id.* at 303. This difference, especially considered in light of the fact that prior to the state's constitution of 1868, "private property could be taken for a purely public purpose, such as a highway, without compensation" at all, led the court to conclude that "just compensation" did not preclude the setoff of proposed "improvements," i.e., benefits. *Id.* We recount what is otherwise doubtless a historical curiosity only to demonstrate how utterly irrelevant it is for interpreting the federal Just Compensation Clause.

Wilson is relevant in one respect, however. In closing its opinion, the South Carolina court had this to say regarding the split that is described in the present petition:

> While the decisions of the Courts of the different States, construing practically the same constitutional provisions, are conflicting, yet, as Mr. Lewis, in [2 *Lewis on Eminent Domain* § 471 (3d ed. 1909)], says, "there can be but one absolutely correct rule" . . . . It is the rule adopted by the Supreme Court of the United States and a majority of the States, and it has the approval of the most eminent text writers. *Bauman v. Ross*, 167 U.S. 548 [1897] . . . .

96 S.E. at 304. Although it got the rule exactly backwards, the court can at least be credited with recognizing that there can be but one "absolutely correct rule," namely, the rule set forth by this Court in *Bauman v. Ross* and adhered to uniformly by the

federal courts of appeals and by most state courts of last resort. In departing from that rule to hold that *general* benefits can be set off against the award of just compensation for the taking of a partial tract of property, the North Carolina Supreme Court effected a demonstrably erroneous application of federal law that warrants summary reversal, if not plenary review.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: November, 2001.

Respectfully submitted,

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APPENDIX

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(July 20, 2001)

B. Opinion of the Court of Appeals of North Carolina
(June 20, 2000)

Appendix A–1

IN THE SUPREME COURT OF NORTH CAROLINA

No. 506A98-2

FILED: 20 JULY 2001

DEPARTMENT OF TRANSPORTATION

v.

JOE C. ROWE and wife, SHARON B. ROWE; HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT; ROBERT W. ADAMS, trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 138 N.C. App. 329, 531 S.E.2d 836 (2000), on remand from this Court, 351 N.C. 172, 521 S.E.2d 707 (1999), finding error in orders entered 8 May 1997 and 16 May 1997 by Baker, J., and in a judgment entered 17 June 1997 by Hyatt, J., in Superior Court, Catawba County, and ordering a new trial. Heard in the Supreme Court 12 February 2001.

Roy A. Cooper, Attorney General, by J. Bruce McKinney, Assistant Attorney General, and T. Lane Mallonee and W. Richard Moore, Special Deputy Attorneys General, for plaintiff-appellant.

Lewis & Daggett, Attorneys at Law, P.A., by Michael J. Lewis; and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for defendant-appellees.

ORR, Justice.

This dispute arose from the North Carolina Department of Transportation's ("DOT") decision to build a road connecting U.S. Highway 70-321 to an interchange on Interstate 40 in Catawba County. To acquire land for this project, the DOT exercised its authority under N.C.G.S. § 136-18 to condemn 11.411 acres of defendants' 18.123-acre tract. As required by statute, the DOT acquired defendants' property by filing a declaration of taking and asking for a determination of just compensation. At trial, the presiding judge instructed the jury as to the requirements of N.C.G.S. § 136-112(1), which provides that just compensation is

> the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1) (1999). The jury rendered a verdict that defendants were not entitled to any financial compensation for the taking. The verdict reflected that the jury agreed with DOT's argument that the "general benefits" to defendants' remaining property from the project exceeded the cost of the loss of acreage. The trial court entered judgment consistent with this verdict, and the defendants appealed.

After reviewing the errors alleged by defendants, the Court of Appeals, *inter alia*, ordered a new trial, on two grounds. First, the Court of Appeals held that N.C.G.S. § 136-112(1) violated the Law of the Land Clause of the North Carolina Constitution. *Department of Transp. v. Rowe*, 138 N.C. App. 329, 342-43, 531 S.E.2d 836, 845 (2000). The Court of Appeals stated that "by allowing general benefits to [set off] the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee." *Id.* at 342,

531 S.E.2d at 845. Second, the Court of Appeals held that the statute denied defendants equal protection of the law under the North Carolina Constitution. The Court of Appeals decision was based upon the different standards for compensation for condemnees set out in two different statutes. Defendants' compensation was determined under N.C.G.S. § 136-112(1) because the DOT condemned the property. However, owners of property condemned under N.C.G.S. § 40A would be entitled to compensation under N.C.G.S. § 40A-64(b), which provides for a compensation system more favorable to condemnees than the system provided for in N.C.G.S. § 136-112(1). The Court of Appeals reasoned that "[b]ecause there is no compelling governmental interest to support [the classes created by N.C.G.S. § 136-112(1) and N.C.G.S. § 40A-64(b)] a . . . property owner's equal protection rights are violated by allowing such a classification." *Id.* at 344, 531 S.E.2d at 846.

Judge Horton dissented on two grounds. He first contended that the Court of Appeals lacked jurisdiction to consider whether this statute violates the Law of the Land Clause of the North Carolina Constitution because defendants neither assigned error on those grounds nor argued that claim before the trial court. He also dissented on the grounds that N.C.G.S. § 136-112(1) does not violate North Carolina's Equal Protection Clause. We agree with Judge Horton on both grounds.

I.

We first conclude that the Court of Appeals erred because the question of whether this statute violates the Law of the Land Clause was not properly presented. As Judge Horton pointed out, Rule 10(c) of the North Carolina Rules of Appellate Procedure requires that an appellant state the legal basis for all assignments of error. N.C. R. App. P. 10(c). We have also held that arguments not made before the trial court are not properly before the Court of Appeals. *State v. King*, 342 N.C. 357, 364,

464 S.E.2d 288, 293 (1995). Here, defendants in their appeal to the Court of Appeals failed to assign error on the grounds that N.C.G.S. § 136-112(1) violates the Law of the Land Clause. Also, defendants did not argue to the trial court that the Law of the Land Clause was an independent reason to strike down the statute. Likewise, they did not even make this argument before the Court of Appeals. Even though defendants argued and assigned error to the effect that N.C.G.S. § 136-112(1) denied defendants equal protection under the law, they never raised the issue of a due process violation under our state Constitution's Law of the Land Clause. Thus, the Court of Appeals erred in considering the constitutionality of the statute on those grounds, and we disavow their reasoning and reverse their holding.

II.

We also agree with Judge Horton that N.C.G.S. § 136-112(1) did not deprive defendants the equal protection of the law, although we agree on different grounds from those stated in the dissent. Thus, for the reasons stated below, we reverse the Court of Appeals' holding that N.C.G.S. § 136-112(1) violates the Equal Protection Clause of the North Carolina Constitution. We also hold that it comports with the United States Constitution.

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws. N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws."); U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). To determine if a regulation violates either of these clauses, North Carolina courts apply the same test. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240

S.E.2d 406, 413 (1978). The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies when a regulation classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 36 L. Ed. 2d 16, 33 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465 (1988); *Craig v. Boron*, 429 U.S. 190, 50 L. Ed. 2d 397 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12 (1992); *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

In concluding that defendants were denied equal protection under N.C.G.S. § 136-112(1), the Court of Appeals applied strict scrutiny. *Rowe*, 138 N.C. App. at 344, 531 S.E.2d at 846. We conclude that it was error to do so. In fact, as explained below, N.C.G.S. § 136-112(1) does not trigger strict scrutiny because it neither classifies on the basis of a suspect classification nor infringes upon a fundamental right. Furthermore, N.C.G.S. § 136-112(1) satisfies rational-basis scrutiny because there are rational reasons for DOT and other

condemnors to use different systems to calculate just compensation.

A.

We begin our analysis by explaining why N.C.G.S. § 136-112(1) receives only rational-basis scrutiny. Strict scrutiny applies only when a regulation classifies persons on the basis of certain suspect characteristics or infringes the ability of some persons to exercise a fundamental right. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Not even defendants contend that they are part of a suspect class deserving the extraordinary protection provided by strict scrutiny. They do, however, contend that N.C.G.S. § 136-112(1) infringes upon a fundamental right: the right to just compensation.

Defendants argue that the Court of Appeals correctly concluded that N.C.G.S. § 136-112(1) infringes upon a fundamental right. They claim that the statute violates their right to just compensation. We disagree. Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution. It is specifically enumerated in the Fifth Amendment to the United States Constitution and has been applied to the states through the 14th. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239, 41 L. Ed. 979, 985 (1897). The right to just compensation is not expressly mentioned in the North Carolina Constitution, but "this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause." *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989); *see also Eller v. Board of Educ. of Buncombe County*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) ("When private property is taken for public use, just compensation must be paid . . . . While this principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' . . . .").

Since a fundamental right is involved, we must determine if that right is infringed upon by application of N.C.G.S. § 136-112(1). If defendants' right to just compensation is impacted by the statute, then that impact would warrant a review under the strict-scrutiny standard. If there is no infringement, then the rational-basis standard would apply.

The Court of Appeals held that defendants did not receive just compensation because the statute allows the jury to consider "general benefits" when it calculates just compensation for a partial taking. "General benefits" are defined as increases in the value of land "which arise from the fulfillment of the public object which justified the taking [and] which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment." *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 434, 126 S.E.2d 107, 112 (1962) (citations omitted); *see also* 3 Julius L. Sackman, *Nichols on Eminent Domain* 8A.02[4][a] (rev. 3d ed. 2000). Examples include the rise in property value due to increased traffic flow, an aesthetic upgrading of a neighborhood, or more convenient parking. 3 *Nichols on Eminent Domain* § 8A.02[4][a]. In contrast, "special benefits" are increases in the value of land "which arise from the peculiar relation of the land in question to the public improvement." *Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112; *see also* 3 *Nichols on Eminent Domain* § 8A.02[4][b]. An example is the rise in property value due to newly acquired frontage on a public street. 3 *Nichols on Eminent Domain* § 8A.02[4][b].

Both of these types of benefits may be considered by the jury when calculating just compensation under N.C.G.S. § 136-112(1). That statute provides that when, as here, only part of a tract is condemned for the construction of a highway, just compensation for the condemnation is

> the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). Because this statute allows a jury to consider "general benefits," the Court of Appeals held that it "allows a compensation which is unjust to the condemnee." *Rowe*, 138 N.C. App. at 342, 531 S.E.2d at 845.

We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider "general benefits." *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918). We are also convinced that the Law of the Land Clause of the North Carolina Constitution allows a jury to consider "general benefits" when it calculates just compensation. Allowing the jury to consider how "general benefits" affect the market value of the condemnee's remaining land is in accord with persuasive federal precedent, with the consistent practice of this Court, and with the purposes underlying the requirement of just compensation.

It is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider "general benefits" when calculating just compensation. The United States Supreme Court stated in *McCoy v. Union Elevated R.R. Co.* that

> we are unable to say that [a property owner] suffers deprivation of any fundamental right when a state . . . permits consideration of the actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages.

Id. at 366, 62 L. Ed. at 1166. This holding, however, was based on the Fourteenth Amendment to the United States Constitution, *id.* at 363, 62 L. Ed. at 1165, and although "[d]ecisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution . . . do not control an interpretation by this Court of the law of the land clause of our state Constitution[, they] are . . . persuasive [authority]," *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) (citations omitted). Even though this interpretation is only persuasive authority, we believe it correctly explains the requirements of just compensation.

This interpretation of just compensation accords with the long practice of our state. Although this Court has never specifically addressed the constitutionality of allowing the fact-finder to consider "general benefits," allowing fact-finders to do so has been the practice of this Court since at least 1893. *See, e.g., Robinson v. State Highway Comm'n*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Proctor v. State Highway & Public Works Comm'n*, 230 N.C. 687, 55 S.E.2d 479 (1949); *Wade v. State Highway Comm'n*, 188 N.C. 210, 124 S.E. 193 (1924); *Miller v. City of Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *see also Department of Transp. v. Mahaffey*, 137 N.C. App. 511, 528 S.E.2d 381 (2000). In 1893 in *Miller v. City of Asheville*, this Court addressed a jury instruction issue arising out of the legislative change applying "special benefits" and "general benefits" in condemnation proceedings. While no constitutional issues were raised, Justice Clark stated for the Court:

> Whether the [condemning authority] can reduce damages by all the benefits accruing the [condemnee], rests with the sovereign when it confers the exercise of the right of eminent domain . . . . [Thus] the present act, which extends the assessment of benefits to all received by the

> landowner, instead of a restriction to the special benefits, is valid. All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and to that alone, he has a constitutional and vested right.

112 N.C. at 768, 16 S.E. at 764. This Court has also stated:

> It is firmly established in this State that "Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking . . . ." Proctor v. State Highway and Public Works Commission, 230 N.C. 687, 691, 55 S.E.2d 479, 482. This rule has been approved many times . . . .

Kirkman, 257 N.C. at 432-33, 126 S.E.2d at 111.

Allowing the fact-finder to consider "general benefits" follows not only persuasive authority and long practice, it also fulfills the purpose underlying the requirement of just compensation: to ensure that persons being required to provide land for public projects are put in the same financial position as prior to the taking. *Accord United States v. 50 Acres of Land*, 469 U.S. 24, 30, 83 L. Ed. 2d 376, 383 (1984) (referring to "the basic principles of indemnity embodied in the Just Compensation Clause"); *cf. State Highway Comm'n v. Phillips*, 267 N.C. 369, 374, 148 S.E.2d 282, 286 (1966) ("In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained by the landowner."). As the United States Supreme Court has

stated, a condemnee "is entitled to be put in as good a position pecuniarily as if his property has not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 1244 (1934).

Here, the argument of defendants, which was accepted by the Court of Appeals, would result in defendants being fully compensated for the land lost *and* being additionally compensated for "general benefits" accruing to their remainder and to the surrounding property owners. While defendants may deem the denial of such a result unfair, it in no way denies them just compensation. As noted by Justice Clark in *Miller*, the legislature has decided that the state can reduce damages by all of the benefits accruing and that decision rests with the legislature in conferring the right of eminent domain. *Miller*, 112 N.C. at 768, 16 S.E. at 764. Just compensation is had when the balance is struck between the damages and benefits conferred. "To that, and to that alone, [defendants have] a constitutional and vested right." *Id.* If defendants are dissatisfied with that result, then their recourse is with the legislature. Furthermore, because the Law of the Land Clause requires only that a condemnee be indemnified, it permits a fact-finder to consider "general benefits" accruing to a condemnee's remaining property. For the purposes of just compensation, damages are measured by the change in the fair market value of the land. *See* 26 Am. Jur. 2d *Eminent Domain* § 298 (1996); *accord Olson*, 292 U.S. at 257, 78 L. Ed. at 1244. A condemnee is thus indemnified if she receives the difference between the fair market value of her property before the condemnation and the fair market value of her remainder after the condemnation. That change in market value is clearly affected by "general benefits" accruing to her remaining property; a benefit is no less real simply because it is shared by a condemnee's neighbor. Therefore, because the Law of the Land Clause requires only that the state indemnify the condemnee, because a condemnee's loss is measured by the

change in the market value of her property, and because that market value is affected by "general benefits," the Law of the Land Clause allows a fact-finder to consider "general benefits" when calculating just compensation. It follows that N.C.G.S § 136-112(1) satisfies that clause. Because N.C.G.S. § 136-112(1) neither infringes defendants' right to just compensation nor classifies persons on the basis of a suspect characteristic it does not trigger strict scrutiny under the Equal Protection Clauses of the North Carolina or United States Constitution. Instead, that statute receives only rational-basis scrutiny.

B.

Defendants contend that N.C.G.S. § 136-112(1) fails rational-basis scrutiny. We disagree. Rational-basis scrutiny requires only that the classification made by the statute be rationally related to a legitimate government objective. *Nordlinger*, 505 U.S. at 10, 120 L. Ed. 2d at 12 ("[U]nless a classification warrants some form of heightened review . . . , the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."); *Texfi*, 301 N.C. at 149, 269 S.E.2d at 149 ("[T]he lower tier of equal protection analysis . . . merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate government interest."). It gives wide latitude to the legislature; if there is any plausible policy reason for the classification, the test is satisfied. *Nordlinger*, 505 U.S. at 11, 120 L. Ed. 2d at 13 ("In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . ."); *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983) ("[I]n instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity.").

In article 9, "Condemnation," of chapter 36 of the North Carolina General Statutes, the General Assembly has set out the

process for the acquisition of property by DOT using the power of eminent domain. Within that article is N.C.G.S. § 136-112, "Measure of Damages." That statute specifically sets out, as previously noted, that just compensation is determined by the fair market value of the property immediately before the taking and immediately after the taking with consideration given to "general benefits" and "special benefits." N.C.G.S. § 136-112(1).

In contrast, article 1 of chapter 40A of the North Carolina General Statutes provides that "[i]t is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemners and all local public condemners." N.C.G.S. § 40A-1 (1999). The statute further provides for the repeal of all other provisions in laws, charters, or local acts authorizing different procedures. *Id.* It is obvious that in 1981 the General Assembly chose to consolidate and make uniform a myriad of laws pertaining to the exercise of eminent domain by public and private condemners.

Chapter 40A thus sets out both the procedure for calculation of just compensation, N.C.G.S. ch. 40A, art. 3, and the measure of just compensation, N.C.G.S. ch. 40A, art. 4, for landowners affected by the exercise of eminent domain. The statute covers: (a) "Private Condemners," such as corporations, boards of trustees, and railroads; (b) "Local Public Condemners," to include both municipalities and counties; and (c) "Other Public Condemners," such as hospital authorities, housing authorities, and watershed-improvement districts. Each section also lists with some specificity the types of public uses that these condemners can undertake through the use of eminent domain.

In determining just compensation for a taking by one of these local or private entities for any of the range of permissible purposes, the General Assembly opted to provide a measure of

just compensation for the affected property owners that ensures a choice in a partial taking. N.C.G.S. § 40A-64(b) allows a property owner to choose the greater of the fair market value before and after the property is taken or the fair market value of the property taken. It is this choice available under N.C.G.S. § 40A-64 and not available under N.C.G.S. § 136-112 that defendants contend violates their constitutional rights.

Defendants claim that this classification between condemnees is not rationally related to any legitimate governmental purpose. However, we agree with the DOT: defendants have failed to carry their burden of proving that there is no rational reason for this distinction. As the DOT suggests, the General Assembly could have determined that public and private condemnors can offset some of their costs through user fees for the service installed through the condemnation services such as water or sewage facilities. Thus, the General Assembly could rationally have believed that public and private condemners should pay damages using either of the two methods allowed by N.C.G.S. § 40A-64.

Furthermore, it is perfectly reasonable for the General Assembly to have determined that, having given the power of eminent domain across this state to every municipality and county; every housing authority; and every private corporation involved in power generation, railroads, telephones, etc., the best way to ensure that a citizen whose property was taken by eminent domain would receive just compensation was by giving him a choice. The circumstances under N.C.G.S. § 40A govern a huge range of types of uses, condemning authorities, and circumstances that would require just compensation. Such a situation is drastically different from the uniform practice of the DOT, an agency of the state, condemning property all across the state for roads. Either of these justifications is sufficient to withstand rational-basis review. Therefore, this classification does not violate the Equal Protection Clause of the United States or North Carolina Constitution.

N.C.G.S. § 136-112(1) is a valid exercise of the legislative power of the North Carolina General Assembly. It does not violate the Equal Protection Clause of the United States or North Carolina Constitution. We therefore reverse the Court of Appeals as to this issue.

Based upon the foregoing, we reverse the decision of the Court of Appeals.

REVERSED.

Appendix B–1

NO. COA97-1470

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2000

DEPARTMENT OF TRANSPORTATION

Plaintiff,

v.

Catawba County
No. 96 CvS 1630

JOE C. ROWE and wife,. SHARON B. ROWE; HOWARD L. PRUITT, JR., and wife, GEORGIA PRUITT; ROBERT W. ADAMS, Trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN-CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC.. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK

Defendants.

Appeal by defendants from judgment entered by Judge J. Marlene Hyatt on 17 June 1997 in Superior Court, Catawba County and orders entered by Judge James L. Baker, Jr., on 8 May 1997 and 16 May 1997 in Superior Court, Catawba County. Heard in Court of Appeals 27 August 1998. On 20 October 1998, the Court of Appeals issued a unanimous decision, 131 N.C. App. 206, 505 S.E.2d 911 (1998), holding in pertinent part that defendants Rowe and Pruitt did not file a timely appeal of preliminary orders entered by Judge Baker following a hearing under N.C. Gen. Stat. § 136-108, but finding error in the admission of evidence which required a new trial in the case. Under N.C. Gen. Stat. § 7A-31 (1999), the

Supreme Court granted discretionary review of this Court's decision on the issue of timeliness of the appeal by defendants Rowe and Pruitt from the interlocutory orders entered on 8 May 1997 and 16 May 1997, and held that "the interlocutory orders entered did not affect a substantial right of defendants and that defendants were not required to immediately appeal the trial court's orders." The case was remanded to this Court for a determination of the issues raised by the appeal from the interlocutory orders.

Attorney General Michael F. Easley, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.

Lewis & Daggett, P.A., by Michael J. Lewis; and Bell, Davis & Pitt, PA, by Stephen M. Russell, for defendants-appellants.

WYNN, Judge.

On 26 June 1995, the North Carolina Department of Transportation brought a declaration of taking action in Superior Court, Catawba County condemning 11.411 acres of the 18.123 acres of land belonging to Joe C. Rowe and his wife, Sharon B. Rowe, and Howard L. Pruitt, Jr., and his wife, Georgia M. Pruitt. However, because the Department of Transportation concluded that the benefits to the defendants' remaining 6.712 acres of property outweighed any loss to the defendants due to the taking, it did not make a deposit of estimated compensation for the 11.411 acres of taken property.

The defendants answered alleging that the "special or general benefits" provision of the condemnation statute, N.C. Gen. Stat. § 136-112(1) (1999), denied them equal protection in violation of the North Carolina and United States Constitutions. The defendants also challenged the Department of Transportation's claim that all of the defendants' remaining tracts of land should be considered in comparing the benefits of the taking to the defendants' resulting loss.

The trial court conducted a pretrial hearing under N.C. Gen. Stat. § 136-108 to settle issues other than the amount of damages. The evidence showed that after the taking the defendants were left with four small tracts of land identified as tracts A, B, C, and D, totaling 6.712 acres. Before the taking, tract A connected to the easternmost part of the property taken by the Department of Transportation and tract B connected at the westernmost part of the taken property. A 70 foot strip of land owned by the City of Hickory separated tract B from tracts C and D. A 60 foot strip of land owned by the City of Hickory separated tracts C and D from each other. The evidence showed that the City of Hickory intended to construct streets on the 60 and 70 foot strips; but, no streets had been constructed on the strips as of the date of the taking.

The trial court determined that the defendants' four remaining tracts had "physical unity" with the condemned property and were therefore, affected by the taking. The trial court also rejected the defendants' claim that the condemnation statute, N.C.G.S. § 136-112(1), was unconstitutional.

Following the preliminary hearing, the matter of just compensation was tried before a jury in the Superior Court, Catawba County. At trial, the trial court instructed the jury that it could consider any special and general benefits to the defendants' property which was not taken, including tracts C and D. The jury returned a verdict concluding that the defendants were not entitled to any compensation for the involuntary taking of their 11.411 acres because the increased value of the remaining four tracts offset the loss of the taken property.

From the trial court's judgment consistent with the jury's verdict, the defendants appeal contending that: (I) the trial court erred in including tracts C and D in the area affected, thereby treating all of the defendants' property as a "unified tract" and (II) N.C.G.S. § 136-112(1), which allows a deduction

from just compensation for "special or general benefits" resulting from the taking, is unconstitutional on its face and as applied to these defendants.

I. AREA AFFECTED BY THE TAKING

The defendants first contend that the trial court erred in including tracts C and D in the area affected by the condemnation proceeding. In support, they argue that tracts C and D have neither physical unity nor unity of use with the land taken by the Department of Transportation.

In most cases, the landowner is the party who seeks to add additional property to the area affected by a condemnation taking of his property in an attempt to increase his damages. *See e.g., City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 451 S.E.2d 358 (1994). But in this case, it is the condemning authority—the Department of Transportation—which seeks to: (1) include tracts C and D in the area affected by the taking and (2) show that tracts C and D are benefitted by the taking to the extent that the Department of Transportation may avoid paying the landowner defendants any compensation whatsoever for the condemned 11.411 acres.

The determination of whether there is a unity of lands in a condemnation proceeding must be based on the facts of each case. The factors which are usually emphasized in such a determination include "unity of ownership, physical unity and unity of use." *Barnes v. North Carolina State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224-25 (1959). Although unity of use is given great weight, the tracts claimed as a single tract "must be owned by the same party or parties." *Id.* at 384, 109 S.E.2d at 225.

In this case, the parties stipulated that there was unity of ownership as to all tracts, including tracts C and D. The parties also agreed that a strip of land owned by the City of Hickory

separates tracts C and D and that another strip of land owned by the City of Hickory separates tracts C and B.

In general, parcels of land must be contiguous to constitute a single tract for the purpose of determining severance damages and benefits. *Id.* "Contiguous" means "[t]ouching at a point or along a boundary." Black's Law Dictionary, p. 315 (7th Ed. 1999). "But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit." *Barnes*, 250 N.C. at 385, 109 S.E.2d at 225.

> It is generally held that parcels of land separated by an established city street, in the use by the public, are separate and independent as a matter of law. 'When land is unoccupied and so not devoted to use of any character, and especially when it is held for purposes of sale in building lots, a physical division by wrought roads and streets creates independent parcels as a matter of law . . . (but) If the whole estate is practically one, the intervention of a public highway legally laid out but not visible on the surface of the ground is not conclusive that the estate is separated.' Nichols on Eminent Domain (3rd Edition), sec. 14.31(1), Vol. 4, pp. 437-8. Lots separated by a public alley but in a common enclosure have been held to be a single property. Mere paper division, lot or property lines and undeveloped streets and alleys and streets are not sufficient alone to destroy the unity of land. 'If the owner's land is merely crossed by the easement of another, the fee remaining in him, and the sections so made are not actually devoted, as so divided, to wholly different uses, they are to be considered wholly contiguous and so as a single parcel or tract.' 6 A.L.R.2d 1200, sec. 2.

Barnes, 250 N.C. at 385, 109 S.E.2d at 225 (citations omitted).

In this case, the defendants did not retain any interest in the strips of land deeded to the City of Hickory for streets, thereby tending to support a finding that there was no physical unity between tracts C and D and the tracts identified as A and B. Even assuming there was physical unity between the aforementioned tracts, lands will not normally be considered to constitute a single tract for the purpose of determining severance damages and benefits unless there is unity of use.

In *Barnes*, our Supreme Court set out the common law test for unity of use holding that:

> 'there must be a connection or relation of adaption, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonable and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.' The unifying use must be a present use. A mere intended use cannot be given effect.

Id. at 385, 109 S.E.2d at 224 (citation omitted).

Applying this rule in *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E.2d 667 (1981), *disc. review denied*, 304 N.C. 724, 288 S.E.2d 808 (1982), our Court held that all of the tracts making up a family owned cattle farm was property affected by the taking of a portion of the property although the farm was divided by two roads and a railway. This Court found "that with a single exception the property was devoted to the single use of cattle farming." *Id.* at 524-25, 281 S.E.2d at 672. But our Court in *Tickle* did exclude one of the parcels from the area affected because that parcel was not used for farming. *See id.* at 527, 281 S.E.2d at 674.

Our General Assembly codified the *Barnes* rule in 1981 providing that "all contiguous tracts of land that are in the same

ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract." N.C. Gen. Stat. § 40A-67 (emphasis added); *see also Department of Transportation v. Nelson Co.*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 451 (1997) (holding that a partially completed office park being constructed as part of a master development plan met the unity of use requirement). It follows that where the uses of the tracts in question are independent of the portion which is taken rather than a part of the integrated economic unit, the tracts cannot be included as part of the area affected by the taking. *See North Carolina Department of Transportation v. Kaplan*, 80 N.C. App. 401, 343 S.E.2d 182 (holding that two tracts were not unified because on the date of the taking neither tract was necessary to the "use and enjoyment" of the other tract), *disc. review denied*, 307 N.C. 269, 299 S.E.2d 214 (1982).

At the time of the taking in this case, the landowners held the four remaining tracts for commercial development. However, the tracts were not being held for "development under a common plan or scheme," as in *Yarbrough*, and the best and highest use of tracts C and D remained economic development after the taking. Because the defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken, no unity of use exists in this case. We, therefore, conclude that the trial court erred in finding that tracts C and D were part of the area affected by the taking.

II. CONSTITUTIONALITY OF N.C.G.S § 136-112(1)

The defendants next challenge the constitutionality of the provision allowing the fair market value of the remainder tract of land to be setoff with any "special or general benefits resulting from the utilization of the part taken for highway purposes" under N.C.G.S. § 136-112(1). They contend that allowing a setoff for "general benefits" resulting from the

taking violates the property owners' rights to: (A) just compensation and (B) equal protection by depriving them of the just compensation received by other property owners also subjected to condemnation proceedings. We address each argument separately.

A. JUST COMPENSATION

"The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state." *State v. Core Banks Club Properties, Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 389 (1969). But this "right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise." *Id.* That right, however, "is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *Id.* at 334, 167 S.E.2d at 388.

Under N.C. Gen. Stat. § 136-18 (1999), our General Assembly delegated to the Department of Transportation the right to condemn private property for the establishment and maintenance of public highways. N.C.G.S. § 136-112 sets out the method for determining "just compensation" for owners of property condemned for highway purposes. Under that statute, the method used to determine just compensation when only a part of a tract of land is taken for the construction of highways is

> the difference between the fair market value of the entire tract immediately prior to the taking and the fair market value of the remainder immediately after the taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). The statutory term "special benefits" refers to those benefits which arise from the peculiar relation of

the land in question to the public improvement, while the term "general benefits" refers to those benefits which accrue to the public at large by reason of increased community property resulting from the project. *See Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 112 (1962), *Department of Transportation v. McDarris*, 62 N.C. App. 55, 302 S.E.2d 277 (1983).

Although the General Assembly may enact a statute to determine the amount of just compensation to be given to landowners of condemned property, a statutory provision that transgresses the authority vested in the legislature by the Constitution empowers the judiciary to declare the act unconstitutional. *See Glenn v. Board of Education of Mitchell County, et. al*, 210 N.C. 525, 187 S.E. 781 (1936) (stating that "[i]t is well settled in this state that the courts have the power, and it is their duty, in proper cases to declare an act of the General Assembly unconstitutional; but it must be plainly and clearly the case"); *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E.2d 546, 552 (1953) (holding that the courts have a duty when it is clear a statute transgresses the authority vested in the legislature by the Constitution to declare the act unconstitutional).

Indeed, our Supreme Court has addressed many issues arising from the language of N.C.G.S. § 136-112(1). *See Kirkman*, 257 N.C. at 432, 126 S.E.2d at 111; *North Carolina State Highway Comm'n v. Black*, 239 N.C. 198, 79 S.E.2d 778 (1954); *Robinson v. State Highway Commission*, 249 N.C. 120, 105 S.E.2d 287 (1958); *Williams v. State Highway Comm'n*, 252 N.C. 514, 114 S.E.2d 340 (1960); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 118 S.E.2d 918 (1961). But our Supreme Court has never addressed the issue presented in this appeal—whether the provision allowing *special* and *general* benefits to setoff the fair market value of the remaining part of a tract of land under N.C.G.S. § 136-112(1) violates the constitutional requirement of providing just compensation in

condemnation proceedings. Since the parties now bring this issue of first impression to this Court, we begin our consideration of this issue by looking at the just compensation methods employed by other jurisdictions to guide us in our determination.

1. RULES IN OTHER JURISDICTIONS ON THE USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

The general rule in partial takings cases is that "special benefits" may be used to setoff damages to the remaining property, but not to offset the compensation due for the property taken. *See* 3 *Nichols on Eminent Domain*, § 8A.03, pp. 8A-46. In fact, jurisdictions[1] following the general rule have held that "a statute which authorizes the payment of any sum that is less than the market value of the land actually taken is unconstitutional. *See id.* at pp. 8A-48.

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[1] *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972) *Chiesa v. State*, 43 A.D.2d 359, 360-61 (N.Y. 1974); *William Natural Gas Co. v. Perkins*, 952 P.2d 483 (Okla. 1997) (holding that in a partial taking case in which condemnor is taking only part of condemnee's property, an increase in the value of remaining property may be offset against any injury to the remaining property, but an increase in the value of the remaining property may not be offset against the value of property that was taken); *State Dep't of Highways v. Stegemann*, 269 So.2d 480 (La. 1972) (holding that a landowner is entitled to demand at least the fair market value of the property taken in money from an expropriating authority, even though he may be damaged to a lesser extent by the taking); *State Highway Comm'n v. Hooper*, 488 P.2d 421 (Or. 1971) (holding that special benefits to the remainder as a result of a partial taking may be used only to reduce any damages claimed to the remainder and cannot be used to reduce the fair market value of the land actually taken); *State v. Carpenter*, 89 S.W.2d 979 (Tex. Comm'n App. 1936) (holding that where a portion of land is taken by condemnation damages to the remainder can be offset by benefits allowed by the law).

For instance, in *City of Orofino v. Swayne*, 504 P.2d 398 (Idaho 1972), the Idaho Supreme Court held that under Idaho's eminent domain statute, benefits which may accrue to the property remaining from a taking may not be considered, except as a setoff against the damages that have accrued to the remaining property as a result of the taking. The Idaho Court recognized that the tendency has been away from the rule that special benefits can be setoff from the entire compensation. Instead, the Idaho Court reasoned that the development of the rule that the land taken, at least, must be paid for in money without consideration of benefits to the remaining land is,

> 'undoubtedly explained by the fact that the propensity of many American communities to be over-sanguine in regard to the beneficial results of projected public improvements had resulted in the taking of much valuable private property for which the owner never received any compensation other than anticipated benefits which never accrued.'

Id. at 401 (quoting 3 *Nichols on Eminent Domain* (Rev. 3d. ed.) § 8.6206(1) p. 97).

Likewise, in *Chiesa v. New York*, 43 A.D.2d 359 (N.Y. App. Div. 1974), the New York Appellate Court held that it would be unconstitutional to allow any benefits to the claimant's remaining lands from the State's appropriation of a portion of the claimant's property to be used as an offset against the award for direct damages for the property taken. In reaching this holding, the New York Court determined that the "application of a rule permitting a setoff against direct damages for enhancement to the remainder would be an unconstitutionally discriminate exercise of taxing power in favor of a neighboring owner who suffers no loss of land, but benefits by the public improvement which led to the taking." *Id.* at 360. The New York Court found that just compensation

> means fair and adequate monetary compensation for land actually taken, regardless of any benefits which may be conferred upon the remainder due to the direct taking . . . .

Id.

Notwithstanding the general rule, the United States Supreme Court, along with a number of other jurisdictions, has held that in partial takings cases setting off the value of the remaining part of the land with "special benefits" resulting from the purpose for which a portion of the tract of land was taken does not violate a property owner's right to just compensation.[2] According to the Supreme Court, "[j]ust compensation means a compensation that would be just in regard to the public, as well as in regard to the individual." *Bauman v. Ross*, 167 U.S. 548, 574, 42 L. Ed. 270, 42 L. Ed. at 283 (1897). Moreover, the "just compensation required by the constitution to be made to the [property] owner is to be measured by the loss caused to him by the appropriation." *Id.* Therefore, the property owner "is entitled to receive the value of what he has been deprived of, and no more." *Id.*

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[2] *See Bauman v. Ross*, 167 U.S. 548, 42 L. Ed. 270 (1897); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960) (holding that when the taking is by a municipal corporation, special benefits may be setoff, even from the value of the land taken); *State v. Midkiff*, 516 P.2d 1250 (Haw. 1973) (holding that in non-highway taking cases, special benefits may be setoff against the value of the part taken and severance damages); *Collins v. State Highway Comm'n*, 66 P.2d 409 (An. 1973) (holding that when a municipal corporation acquires property for a highway purpose, special benefits may be setoff from the value of the land taken and damages); *State v. Ward*, 252 P.2d 279 (Wa. 1953) (holding that when the taking is by a state or municipal corporation, benefits may be setoff from the value of the property taken and damages).

> Consequently, when part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.

Id.

In contrast to the general rule's application to "special benefits", most jurisdictions[3] hold that "general benefits" may not be used to setoff damages "because the owner whose land is taken would be placed in a worse position than his neighbor whose estate lies outside the path of improvement and who shares in the increased value without any pecuniary loss." *Nichols*, § 8A.03, pp. at 8A-47.

> Arguably the setoff of general benefits denies the condemnee the constitutional guarantee of just compensation since he is singled out and deprived of a share in the increased prosperity of his fellow citizens merely because the public happens to want a portion of his land. The condemnee pays in taxation for his share of general benefits, just as

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[3] *See e.g., Phoenix Title & Trust Co. v. State of Arizona ex rel. Herman*, 425 P.2d 434 (Ariz. 1967); *Lazenby v. Arkansas State Highway Comm'n*, 331 S.W.2d 705 (Ark. 1960); *Denver Joint Stock Land Bank v. Board of County Com'rs of Elbert County*, 98 P.2d 283 (Colo. 1940); *Schwartz v. City of New London*, 120 A.2d 84 (Conn. Com. Pl. 1955); *Acierno v. State of Delaware*, 643 A.2d 1328 (Del. Supr. 1994); *City of Wichita v. May's Co. Inc.*, 510 P.2d 184 (Kan. 1973); *Louisiana Power & Light Co. v. Lasseigne*, 240 So.2d 707 (La. 1970); *Amory v. Commonwealth*, 72 N.E.2d 549 (Mass. 1947); *State Highway Comm'n v. Vorhof-Duenke Co.*, 366 S.W.2d 329 (Mo. 1963); *Frank v. State, Dep't of Roads*, 129 N.W.2d 522 (Neb. 1964); *State Highway Comm'n v. Bailey*, 319 P.2d 906 (Or. 1957); *State v. Davis*, 140 S.W.2d 861 (Tex. Civ. App. 1940), *disapproved by State v. Meyer*, 403 S.W.2d 366 (Tex. 1966); *State Highway Comm'n v: Rollins*, 471 P.2d 324 (Wyo. 1970).

> other members of the public, and therefore is entitled to receive his fair portion of general advantages brought about by a public improvement.

However, the United States Supreme Court left the determination as to whether using *general* benefits as a setoff deprives a property owner of just compensation to the states. In fact, the Court stated that:

> we are unable to say that [the property owner] suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury.

McCoy v. Union Elevated R. Co., 247 U.S. 354, 366, 62 L. Ed. 1156, 1164 (1918); *see McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931) (stating that "the United States Supreme Court leaves the question to the states, with assurance that, if the Constitution and laws of the state permit a deduction of general benefits, it will not violate the Fifth and Fourteenth Amendments to the United States Constitution").

Accordingly, some states[4] do not follow the majority rule; rather, these states allow both *special* and *general* benefits to

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[4] *See e.g., State ex rel. State Highway Comm'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 417 P.2d 68 (N.M. 1966) (holding that the benefit of construction of a highway which enhances the value of a remainder of a tract of land is to be included in the determination of the value of the land after the taking); *Smith v. City of Greenville*, 92 S.E.2d 639 (S.C. 1956) (holding that the benefits to the residue of a landowner's land from the construction of a street should be applied against the value of the land actually taken).

setoff either the severance damages or the value of the land of the property taken. *See Nichols*, § 8A.03, pp. at 8A-47.

2. THE EFFECT OF NORTH CAROLINA'S USE OF SPECIAL AND GENERAL BENEFITS IN CALCULATING JUST COMPENSATION

In North Carolina, N.C.G.S. § 136-112(1) permits both *special* and *general* benefits to setoff the value of the land taken for highway purposes. Most recently, this Court in *Department of Transportation v. Mahaffey*, 2000 WL 390133 (N.C. App. April 18, 2000) in construing *Bauman*, 167 U.S. at 574, 42 L. Ed.2d at 283, stated that:

> [a]s we are unable to discern any material difference before the Bauman court and section 136-112, we hold section 136-112 does not violate the federal Due Process Clause.

Mahaffey, 2000 WL 390133 (N.C. App. April 18, 2000).

In *Bauman*, the United States Supreme Court upheld a federal statute which provided that in estimating damages for the taking of any land, the jury should take into consideration the benefit to the owner by enhancing the value of the remainder of his land. *Bauman*, 167 U.S. at 548, 42 L. Ed.2d at 270. *Bauman*—unlike N.C.G.S. § 136-112(1)—also provided for an assessment of one-half the cost of any improvement upon the adjacent property and directed that, in case any sum had been deducted for benefits from the award for land taken, allowance for the deduction should be made in determining the amount of the assessment. *Id.*

The United States Supreme Court limited its decision in *Bauman* by its later pronouncement in *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156. In *McCoy*, the Supreme Court held that states have the discretion of determining whether using *general* benefits as a setoff deprives a property owner of just compensation. *McCoy*, 247 U.S. at 354, 62 L. Ed. at 1156.

Thus, since we only addressed the applicability of *Bauman* in *Mahaffey*, we left undetermined the question of whether using *general* benefits as a setoff constitutes just compensation.

And, we again reiterate the holding of *Mahaffey* that the "special benefits" rule of N.C.G.S. § 136-112(1) is constitutionally sound. In comparing that provision with the various methods employed by other jurisdictions in calculating just compensation, we find that our statutory rule allowing "special benefits" to affect the value of the remaining tract of land does not violate the constitutional requirement of providing just compensation in condemnation proceedings. Indeed, since any resulting "special benefits" are uniquely enjoyed by the property condemned, assessing a cost through a setoff, is constitutionally permissible and has been consistently approved by the United States Supreme Court, along with a number of other jurisdictions.[5] *See Kirkman*, 257 N.C. at 433, 126 S.E.2d at 112.

Moreover, given the legislature's discretion in determining just compensation, without a clear indication that a different result must exist, the legislature's enactment of the statute's provision for "special benefits" must be upheld. *See Glenn*, 210 N.C. at 525, 187 S.E. at 781; *Wilson*, 238 N.C. at 23, 76 S.E.2d at 552. And for a different result to be reached, such a determination would have to made by our legislature, not this Court. *See id.*

However, we reach a different conclusion as to our "general benefits" rule under N.C.G.S. § 136-112(1) which allows the *general* benefits to affect the value of the remaining property. Since "general benefits" are those benefits which accrue to the general public as a result of the condemnation of certain property for public purposes, that provision of the statute charges the property owner with a cost for those benefits

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[5] *See* note 2, *supra*.

that the public also enjoys without being subjected to any similar charge. *See McDarris*, 62 N.C. App. at 55, 302 S.E.2d at 277. In effect, the property owner is subjected to an involuntary taking of his property while also being subjected to the injustice of receiving an amount less than what he has actually loss. *See Nichols*, § 8A.03, pp. at 8A-49 ("Forcing the condemnee not only to give up a portion of his land, but also to receive nothing for it places a disproportionate share of the cost of the public improvement on his shoulders."). He is placed in a position where he is being required to carry the undue burden of paying an additional cost not paid by the public merely because his property has been taken for public purposes.

To emphasize the undue burden placed upon a property owner subjected to the provisions of N.C.G.S. § 136-112(1), consider the following hypothetical case: Farmer Jones owns 20 acres of land with a fair market value of $50,000.00. Through eminent domain, the government condemns 15 acres of Farmer Jones' property for highway purposes. In computing just compensation under N.C.G.S. § 136-112(1), the government determines that the value of the surrounding property and the remaining 5 acres has so greatly increased in value as a result of the new highway that Farmer Jones should get nothing for the 15 acres that it took from him. Farmer Jones' sacrifice of 15 acres of his land for the surrounding land owner and the public illustrates how a pure economic analysis can fail to import fairness and due process in condemnation damage determination. It further shows that the "cost and benefit" result of computing just compensation under N.C.G.S. § 136-112(1) fails to consider the private involuntary taking of land for public good. Should the government decide who will get the *full* benefit of his land at the *expense* of others? Surely the results under our statute suggest that had the government taken another landowner's land, then Farmer Jones would have enjoyed the increased valuation of his entire 20 acre tract.

Likewise, in this case, the Department of Transportation condemned 11.411 acres of the defendants' 18.123 acres of property. In return, the defendants received no compensation for their taken property because the accrued benefits resulting from the roadway caused the fair market value of the remaining 6.712 acres to equal or exceed the fair market of the whole tract of land before the taking.

In essence, by allowing general benefits to setoff the fair market value of the remaining land, the statute allows a compensation which is unjust to the condemnee while providing a windfall to the public. We agree with the rule in most jurisdictions that a statute, such as N.C.G.S. § 136-112(1), allowing *general* benefits to be used as a setoff is unconstitutional.[6] Accordingly, we hold that the provision regarding *general* benefits under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirement of providing just compensation in condemnation proceedings.

B. EQUAL PROTECTION

Alternatively, the defendants contend that N.C.G.S. § 136-112(1) violates the equal protection rights of the property owners who have part of a tract of land condemned for highway purposes because they are denied the just compensation received by other property owners also subjected to condemnation proceedings. We agree.

In addressing a claim that the Equal Protection Clause has been violated, the courts employ a two-tiered analysis. *See In re Consolidated Appeals of Certain Timber Companies from the Denial of Use Value Assessment and Taxation by Certain Counties*, 98 N.C. App. 412, 419, 391 S.E.2d 503, 507 (1990).

The upper tier is employed

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[6] *See* note 3, *supra*.

> [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right . . . or when a governmental classification distinguishes between persons in terms of any right, upon some 'suspect' basis . . . .

Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (citations omitted). This tier, calling for strict scrutiny, "requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest." *Id.*

The lower tier is employed "[w]hen an equal protection claim does not involve a 'suspect class' or a fundamental right . . ." *Id.* "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Id.*

In the present case, the defendants support their equal protection claim by comparing the method of determining just compensation under subsection (1) of N.C.G.S. § 136-112 with the methods of determining just compensation when: (1) part of a tract of land is condemned under Chapter 40A of the General Statutes and (2) a whole tract of land is condemned for highway purposes under subsection (2) of N.C.G.S. § 136-112.

Because just compensation—the basis of the classification in the present case—is a fundamental right protected under both the federal and state constitutions, we employ strict scrutiny in analyzing the defendants' equal protection claim. *See* U.S. Const. amend. V; N.C. Const. Art. I § 19.

As stated, N.C.G.S. § 136-112(1)'s provision allowing the general benefits to be used as a setoff violates the property owners' rights to just compensation for the property taking. However, a similar setoff is not imposed upon a property owner subjected to a taking under N.C. Gen. Stat. § 40A-64(b). In

fact, this statute provides that for partial takings cases, the method for determining just compensation is.

> the greater of either (i) the amount by which the fair market value of the entire tract it immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

N.C.G.S. § 40A-64(b) (1999).

Therefore, a property owner will receive just compensation if the taking is imposed under N.C.G.S. § 40A-64(b), even though the same property owner is not entitled to compensation which is just if the imposed taking is under N.C.G.S. § 136-112(1). Both statutes involve partial takings cases with the difference being who is the condemnor. Under the former statute, the condemnor is an entity other than the Department of Transportation, while the Department of Transportation is the condemnor under the later statute.

Hence the classification between N.C.G.S. § 40A-64(b) and N.C.G.S. § 136-112(1) is based on whether the taking is for highway purposes. Because there is no compelling governmental interest to support this classification, we must find that a property owner's equal protection rights are violated by allowing such a classification to exist.

Also, we find that a property owner's equal protection rights are violated by the distinction in the compensation method under subsection (1) of N.C.G.S. § 136-112 and the compensation method statute, like consideration under subsection (2) of N.C.G.S. § 136-112. Subsection (2) of the N.C.G.S. § 40A-64(b), does not require a consideration of the general benefits resulting from the condemnation. In particular, N.C.G.S. § 136-112(2) provides that:

> [w]here the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking.

N.C.G.S. § 136-112(2).

Thus, a property owner who has a whole tract of land condemned for highway purposes under N.C.G.S. § 136-112(2) receives just compensation, while a property owner who has only a part of a tract of land condemned for highway purposes does not receive just compensation. The result of the classification is that a property owner who has only a part of a tract of land condemned for highway purposes, as opposed to a whole tract of land condemned for the same purpose, is being penalized for not having his whole tract condemned. No compelling governmental interest exists to support such a penalty. Therefore, the provision allowing *general* benefits to be used as a setoff under N.C.G.S. § 136-112(1) violates, on its face and as applied to the defendants in this case, the constitutional requirements of equal protection under the law.

Finding N.C.G.S. § 136-112(1) to be violative of both the constitutional requirement of just compensation and the constitutional requirement of equal protection, we hold that the trial court erred in concluding "that the defendants . . . failed to present sufficient evidence to support the constitutional issues raised and the relief requested." For the reasons set out in our prior opinion filed herein, and because of the errors stated herein, there must be a

New trial.

Judge HUNTER concurs.

Judge HORTON dissents in part in a separate opinion.

NO. COA97-1470

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2000

DEPARTMENT OF TRANSPORTATION

Plaintiff,

v.

Catawba County
No. 96 CvS 1630

JOE C. ROWE and wife,. SHARON B. ROWE; HOWARD L. PRUITT, JR., and wife, GEORGIA PRUITT; ROBERT W. ADAMS, Trustee; ALINE D. BOWMAN; FRANCES BOWMAN BOLLINGER; LOIS BOWMAN MOOSE; DOROTHY BOWMAN ABERNETHY and husband, KENNETH H. ABERNETHY; MARTHA BOWMAN-CAUDILL and husband, JACK CAUDILL; APPALACHIAN OUTDOOR ADVERTISING CO., INC.. (formerly Appalachian Poster Advertising Company, Inc.), Lessee; and FLORENCE BOWMAN BOLICK

Defendants.

HORTON, Judge, dissenting in part.

I concur in that portion of the majority opinion which holds that the trial court erred in finding that tracts C and D were part of the area affected by the taking of defendants' property. I respectfully dissent, however, from that portion of the majority opinion holding that N.C. Gen. Stat. § 136-112(1) violates "both the constitutional requirement of just compensation and the constitutional requirement of equal protection . . . ."

I.

With regards to the constitutionality of N.C. Gen. Stat. § 136-112(1), most of the arguments now advanced by the defendants were not made in the trial court and are not properly before us on this appeal. *See State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). In their "Answer, Motions and Counterclaim," defendants allege as a First Defense "[t]hat N.C. Gen. Stat. § 136-112(1), insofar as it provides that the measure of damage be determined 'with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes,'" denies the defendants just compensation in violation of Article I, Section 19, of the North Carolina Constitution ("law of the land" provision); Amendment V to the United States Constitution ("just compensation" provision); and Amendment XIV to the United States Constitution ("equal protection" and "due process of law" provisions).

At a pretrial hearing pursuant to N.C. Gen. Stat. § 136-108, the defendants argued there were two bases for their constitutional challenge to N.C. Gen. Stat. § 136-112(1). Defendants first made an equal protection argument, contending that just compensation for a partial taking of property is calculated under two different statutory schemes: one for property owners whose lands were condemned by the Department of Transportation (DOT) pursuant to the provisions of Chapter 136, and the other for property owners whose lands were condemned by private and local public condemnors pursuant to the provisions of Chapter 40A of the General Statutes. In determining the issue of damages under the provisions of N.C. Gen. Stat. § 136-112(1), the finder of fact is to consider "general and special benefits" to the portion of the lands not taken, while under N.C. Gen. Stat. § 40A-64(b) no such consideration is mandated. Defendants argued to the trial court that since the measure of compensation was different

depending on the identity of the condemning authority, landowners whose property was condemned were treated differently and thus deprived of equal protection. Defendants also stated prior to their argument on this point that their "constitutional attack on the benefits portion of Chapter 136 . . . *is based very simply on this premise* . . . ." (Emphasis added.)

The second argument made by defendants was that DOT acted arbitrarily and capriciously, in failing to offer any compensation to defendants, treating these defendants in a different manner than other nearby landowners—such as Martin Marietta—who had been paid compensation by DOT. That contention was properly overruled by the trial court due to an absence of evidence of arbitrariness or caprice by DOT, and is not before us at this time.

Further, two of defendants' Assignments of Error relate to the constitutional question raised by defendants. They are:

> 3. The Trial Court's denial of Defendants' constitutional defenses on the grounds that G.S. 136-12(1) [sic] violates the equal protection provisions of the United States and North Carolina Constitutions.
>
> 4. The Trial Court's allowing the Jury to consider the benefit to Defendants' property in making its determination as to damages recoverable by the Defendants for the taking in that this violated Defendants' rights to equal protection under the United States and North Carolina Constitutions.

Even according a generous interpretation to the Assignments of Error, it is obvious that defendants have not preserved and brought forward a constitutional challenge based on a due process argument. Further, a unanimous panel of this Court has

recently squarely rejected such an argument in *Dept. of Transportation v. Mahaffey*, __ N.C. App. __, __ S.E.2d __ (COA99-567) (filed 18 April 2000) ("[S]ection 136-112 does not violate the federal Due Process Clause. It, therefore, follows our state constitution 'law of the land' clause is not violated.")

At most, then, defendants have brought forward (1) the equal protection argument they advanced below centering on the different measures of damages for landowners whose property is taken under Chapter 136 and those whose property is taken under Chapter 40A; and (2) an argument that the trial court erred in allowing the jury to consider the "special and general benefits" to defendants' property in determining damages. Thus, much of the majority opinion deals with questions of constitutional law which are not properly before us, and declares section 136-112(1) unconstitutional based on theories not advanced before the trial court. "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

II.

The constitutional issue which is properly before us is whether the equal protection provisions of the Constitutions of the United States and the State of North Carolina are violated by the different damages schemes found in sections 136-112(1) and 40A-64(b).

A sovereign state has the inherent power to take the property of its citizens for public use. The exercise of that power is limited, however, by constitutional guarantees of due process and payment of "just compensation" for the property taken. *State v. Club Properties*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). In Chapter 136 of our General Statutes, our General Assembly confers the right of eminent domain on DOT, and sets out the method for determining just

compensation for the property taken. N.C. Gen. Stat. § 136-103, *et seq*. Where an entire tract is taken, the measure of damages is "the fair market value of the property at the time of taking." N.C. Gen. Stat. § 136-112(2) (1999). Where only a portion of a tract is taken, as in the case before us,

> the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, *with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes*.

N.C. Gen. Stat. § 136-112(1) (1999) (emphasis added). The burden of proof on the existence and amount, of such special or general benefits is on DOT. *Board of Transportation v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980). Defendants here contend that allowing the jury to consider the benefits to the remainder of their property affected by the taking violates their right to equal protection under the law. Defendants stress that where property is condemned by a private condemnor or a local public condemnor pursuant to the provisions of Chapter 40A of the General Statutes, a different method of determining damages is mandated. N.C. Gen. Stat. § 40A-64(b) provides that

> [i]f there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder it immediately after the taking; or (ii) the fair market value of the property taken.

Our Supreme Court set out in *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980), the traditional

two-tiered "scheme of analysis when an equal protection claim is made." *Id.* at 10, 269 S.E.2d at 149. First,

> [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when .a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.

Id. at 11, 269 S.E.2d at 149 (citations omitted). I do not find evidence here that the defendants are members of a class which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Id.* Nor do I find an infringement of the defendants' constitutionally guaranteed right to just compensation for property taken for a public purpose. "Just compensation" is not defined in either our Constitution or that of the United States, but is left to the sound discretion of state legislatures. Our General Assembly has set out in N.C. Gen. Stat. § 136-112 the method for determining just compensation where property is taken by DOT.

Moving then to the second tier of the analysis, the question becomes whether N.C. Gen. Stat. § 136-112 bears a rational relationship to a legitimate governmental purpose "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

Clearly, the construction and maintenance of a statewide system of roads is a legitimate public purpose. In the course of development of roads throughout the state, it is inevitable that

some privately held property must be taken for public purposes. Our General Assembly has granted the power of eminent domain to DOT. N.C. Gen. Stat. § 136-18 (1999). In the interest of fairness and in satisfaction of constitutional guarantees that just compensation be paid to a citizen whose property is taken for public purposes, the General Assembly has set out in N.C. Gen. Stat. § 136-112 the measure of damages for such taking. All citizens whose property is taken by DOT have their damages measured by the same standard. I find here no evidence that defendants have been treated in a different manner than other members of the class of persons affected by condemnation of a part of their property for highway purposes. After careful consideration of defendants' arguments and contentions, I cannot find any evidence of a violation of their constitutional rights to equal protection, and find support for my opinion in the prior decisions of our Supreme Court.

It has long been settled in North Carolina that it is within the power of the General Assembly to provide that, when only a portion of the landowner's property is taken in a condemnation action, the trier of fact is to consider both special and general benefits to the remainder of the landowner's property in determining the amount of just compensation to be paid him. *Miller v. Asheville*, 112 N.C. 759, 16 S.E. 762 (1893); *Wade v. Highway Com.*, 188 N.C. 210, 124 S.E. 193 (1924); *Elks v. Comrs.*, 179 N.C. 241, 102 S.E. 414 (1920); *Bailey v. Highway Commission*, 214 N.C. 278, 199 S.E. 25 (1938).

In *Miller*, our Supreme Court upheld the validity of an Act of our General Assembly providing that both general and special benefits must be considered in assessing landowners' damages arising from a condemnation of a portion of their property by the City of Asheville. "The Legislature, in conferring upon the corporation [City of Asheville] the exercise of the right of eminent domain, can *in its discretion* require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages." *Miller*, 112 N.C.

at 768, 16 S.E. at 764 (emphasis added). Where the legislature made no such provision, however, the "old" rule applied, and only special damages could be deducted. In *R.R. v. Platt Land*, 133 N.C. 266, 45 S.E. 589 (1903), after tracing the history of the rule, Justice Connor stated that "*in the absence of any express language to the contrary*, only special benefits can be deducted from the compensation or damages assessed against the corporation [Southport, Wilmington and Durham Railroad Company]." *Id.* at 274, 45 S.E. at 592.

In *Elks*, Chief Justice Clark, who authored the opinion in *Miller*, again cited the holding of the Supreme Court in *Miller* that the legislature could "authorize the deduction of general as well as special benefits from the damages assessed, but holding that if the statute does not so provide, only the special benefits will be deducted." *Elks*, 179 N.C. at 247, 102 S.E. at 417.

In 1923, the General Assembly amended the statutes setting out the measure of damages in condemnations brought by the State Highway Commission, to provide that both "general and special benefits shall be assessed as off-sets against damages . . . ." Public Laws 1923, Chapter 160, sec. 6. Our Supreme Court, citing *Miller* with approval, upheld the validity of the change and its application to pending litigation in *Wade*, 188 N.C. 210, 124 S.E. 193. The Supreme Court remanded *Wade* to the trial court for a new trial on damages because the trial court only charged the jury to consider the special benefits accruing to the landowner, and did not include the general benefits to the landowner's remaining property. *Id.* Again, in *Bailey v. Highway Commission*, the Supreme Court remanded for a new trial because the trial court did not charge the jury to consider the general benefits to the landowner's remaining property as an offset against the amount of compensation. 214 N.C. 278, 279, 199 S.E. 25, 26 (1938). *See also Kirkman v. Highway Commission*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962), and the cases cited therein.

Thus, it appears that for more than a century, our Supreme Court has upheld the doctrine of *Miller v. Asheville* and the power of the General Assembly to provide that damages in a condemnation case may be offset by special benefits, general benefits, or both special and general benefits. In the exercise of its discretion, the General Assembly has provided for a different measure of damages where property is taken by private condemnors and local public condemnors under the provisions of Chapter 40A. N.C. Gen. Stat. § 40A-64(b). By contrast, where property is taken by DOT, as here, the jury is to take into account both special and general benefits in determining the issue of damages. N.C. Gen. Stat. § 136-112(1). I do not believe that any equal protection violation arises because of the distinction between the measure of damages in the two statutes. As Chief Justice Clark explained in *Elks*:

> The distinction seems to be that where the improvement is for private emolument, as a railroad or water power, or the like, being only a *quasi*-public corporation, the condemnation is more a matter of grace than of right, and hence either no deductions for benefits are usually allowed, or only those which are of special benefit to the owner, but *where the property is taken solely for a public purpose, the public should be called upon to pay only the actual damages, after deducting all benefits, either special or general.*

Elks, 179 N.C. at 245, 102 S.E. at 416-17 (emphasis added).

I am aware that our sister states have enacted a wide variety of statutory schemes with regard to the measure of damages in condemnation cases, and that many of them do not provide for an offset for special and general benefits against property which remains after a taking. *See* 3 *Nichols on Eminent Domain*, § 8A.03, pp. 8A-26 to 8A-29. However, as our Supreme Court has consistently held, that decision is for

our legislature, not for this Court. "All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right." *Miller*, 112 N.C. at 768, 16 S.E. at 764.

A statute is presumed to be constitutional, so one who challenges its constitutionality has the burden of establishing it. *State v. Johnson*, 124 N.C. App. 462, 474, 478 S.E.2d 16, 23 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). I agree with the trial court, which concluded after a hearing "that the defendants have failed to present sufficient evidence to support the constitutional issues raised and the relief requested."

III.

In their fourth Assignment of Error, defendants argue that the trial court erred in allowing the jury to consider the benefits to their property in determining damages. Although I find no constitutional infirmity in our statutory scheme for measuring damages in a Chapter 136 condemnation action, I also note that defendants did not object to the jury charge of the trial court relating to calculation of damages. Prior to submission of the case to the jury, the trial court held a charge conference and explained to counsel that it would be using section 835.12 of the Pattern Jury Instructions, "which is the eminent domain. partial taking by the DOT and I will include the benefit portion of that charge." Defendants did not object to the use of the pattern instruction, and asked only that the trial court use section 101.25 on expert witnesses, and section 101.30, dealing with interested witnesses.

The trial court then charged the jury, among other things, that in determining defendants' damages it might consider "any general or special benefits resulting from the utilization of the part [of the property] taken for public use." After completion

of the charge, the trial court asked counsel in the absence of the jury whether they had objections, changes, additions, or deletions to the charge. Counsel for the defendants answered that they did not. It appears that defendants cannot now assign error to any portion of the jury charge, particularly to those portions in which the trial court instructed the jury on the measure of damages. N.C.R. App. P. 10(2).

While I agree that the defendants are entitled to a new trial for reasons set out in our prior opinion in this case, and in Section I of the majority opinion, I dissent from that portion of the majority opinion which would declare N.C. Gen. Stat. § 136-112(1) unconstitutional for reasons not properly before us. In any event, we are not justified in declaring invalid this enactment of our legislature, its unconstitutionality not being "plainly and clearly the case." *Glenn v. Board of Education of Mitchell County, et. al.*, 210 N.C. 525, 187 S.E. 781 (1936).